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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

SEAN KENSINGER,

Plaintiff,

v.

**CALIFORNIA HIGHWAY PATROL, et
 al.,**

Defendants.

C 11-00885

DEFENDANTS' MOTION IN LIMINE NO. 2:
TO EXCLUDE EVIDENCE OF THE
CUSTOMS, POLICIES AND PRACTICES
OF THE CALIFORNIA HIGHWAY
PATROL RELATING TO EXCESSIVE
FORCE AND/OR UNREASONABLE
SEARCHES AND/OR SEIZURE

Trial Date: June 25, 2012
 Courtroom: 8 (19th Floor)
 Judge: Honorable William Alsup

PRELIMINARY STATEMENT

When Plaintiff filed this case in February 24, 2011, he asserted a single cause of action against the California Highway Patrol ("CHP"). On April 14, 2011, the CHP filed a Motion to Dismiss based on the Eleventh Amendment to the U.S. Constitution. The motion was resolved when counsel stipulated to the dismissal of the CHP from this action on June 2, 2011.

By this motion in limine, Defendants Paul Craft and Jeffrey Goodwin seek an order from this Court precluding any offer of evidence, whether testimonial or by way of documents, or making any argument that "the violation of [Plaintiff's] constitutional rights was caused as a result of the customs, policies, and/or practices of" the CHP (Compl. at 7:19-20), on the grounds

1 that such evidence is irrelevant. Fed. R. Evid. 401, 402.

2 ANALYSIS

3 Not only does the Eleventh Amendment bar an action against the CHP in federal court, it is
4 well-established that there is no such thing as vicarious liability under 42 U.S.C. § 1983. *Taylor*
5 *v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Even when only individual officers are named as
6 defendants, “[u]nder Section 1983, supervisory officials are not liable for actions of subordinates
7 on any theory of vicarious liability.” *Hansen v. Black*, 995 F.2d 642, 646 (9th Cir. 1989).

8 In this case, Plaintiff asserted several factual allegations against the CHP that are irrelevant
9 to plaintiff’s claims against defendants Craft and Goodwin for excessive force. For example,
10 Plaintiff alleged that the CHP “failed to take any or appropriate remedial action to prevent
11 ongoing violations of the rights of citizens [by CHP officers] involving unreasonable seizures and
12 the use of excessive and unjustified force in violation of the constitutional rights of citizens.” *See*
13 *Compl.* at 8:5-8. In the context of Plaintiff’s excessive force claim against defendants Craft and
14 Goodwin, the actions of other officers in other circumstances – whether presented as separate
15 incidents or as a compilation of data (both of which may be objectionable as hearsay under
16 Federal Rules of Evidence 802) – would not tend “to make a fact more or less probable than it
17 would be without such evidence.” Fed. R. Evid. 401(a).

18 In addition, Plaintiff alleged that prior to the incident, the CHP “knew and/or should have
19 reasonably known that [defendants Craft and Goodwin] required additional and/or different
20 training, supervision and/or discipline in unreasonable seizures and the use of excessive and
21 unjustified force in violation of the constitutional rights of citizens.” (*Compl.* at 8:10-14). A
22 claim for inadequate training will not lie against the defendant officers themselves. *See City of*
23 *Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989) (recognizing liability against a municipality for
24 inadequate training or supervision of police officers). That Defendants could have received
25 additional or different training, supervision, and/or discipline is irrelevant for determining the
26 issue posed in this case: whether given the facts and circumstances of the particular case the
27 defendant’s use of force was objectively unreasonable, as “judged from the perspective of a
28

1 reasonable officer on the scene, rather than with 20/20 vision of hindsight.” *Graham v. Connor*,
2 490 U.S. 386, 396-97 (1989).

3 Lastly, even if this Court finds that such evidence is marginally relevant to Plaintiff’s
4 claims, this Court should also find that the probative value of any evidence of misconduct by
5 other officers as well as their common employer’s allegedly inadequate or inappropriate response
6 to such misconduct, “is substantially outweighed by a danger of one or more of the following:
7 unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or
8 needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

9 CONCLUSION

10 For the reasons set forth above, Defendants seek an order from this Court precluding any
11 evidence of or argument as to the misconduct of other officers; the response of the CHP to the
12 alleged misconduct of other officers; the allegedly inappropriate or inadequate training that CHP
13 provides to its officers, including but not limited to defendants; and as to any customs, policies,
14 and/or practices of the CHP that Plaintiff contends caused the violation of his constitutional
15 rights.

16 Dated: May 29, 2012

Respectfully Submitted,

18 KAMALA D. HARRIS
Attorney General of California
19 JOHN P. DEVINE
Supervising Deputy Attorney General

20
21 /s/ AMY W. LO
AMY W. LO
Deputy Attorney General
Attorneys for Defendants
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DECLARATION OF SERVICE BY FACSIMILE

Case Name: **Sean Kensinger v. CHP et.al.**

No.: **C 11-00885**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. My facsimile machine telephone number is (415) 703-5480.

On May 29, 2012 at 4:45 PM., I served the attached **DEFENDANTS' MOTION IN LIMINE NO. 2: TO EXCLUDE EVIDENCE OF THE CUSTOMS, POLICIES AND PRACTICES OF THE CALIFORNIA HIGHWAY PATROL RELATING TO EXCESSIVE FORCE AND/OR UNREASONABLE SEARCHES AND/OR SEIZURE** by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2.306. The facsimile machine I used complied with Rule 2.306, and no error was reported by the machine.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 29, 2012, at San Francisco, California.

Nancy Quach
Declarant


Signature

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Attorneys for Plaintiff SEAN KENSINGER

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SEAN KENSINGER,

Plaintiff,

v.

CALIFORNIA HIGHWAY PATROL, PAUL
CRAFT, AND J. GOODWIN, and DOES 1-
20 inclusive,

Defendants

No. CV 11-00885 WHA

**PLAINTIFF SEAN KENSINGER'S
OPPOSITION TO DEFENDANT'S
MOTION IN LIMINE NO. 2 TO
EXCLUDE EVIDENCE OF CUSTOMS,
POLICIES, AND PRACTICES OF THE
CALIFORNIA HIGHWAY PATROL
RELATING TO EXCESSIVE FORCE**

Date:
Time:
Dept.:

I. INTRODUCTION

Plaintiff Kensinger submits the following opposition to Defendant's Motion in Limine No. 2 to exclude evidence of the customs, policies, and practices of the California Highway Patrol ("CHP") relating to excessive force. Defendant Craft seeks to exclude reference to the following: (i) misconduct of other CHP officers; (ii) the response of the CHP to the alleged misconduct of other officers; (iii) the allegedly inappropriate or inadequate training that CHP provides to its officers; and (iv) any customs, policies, and or practices of the CHP that Plaintiff contends caused the violation of his constitutional rights. In response to this argument, Plaintiff Kensinger does not oppose the exclusion of references by argument or introduction of evidence

1 with respect to subparts (i) – (iii). However, Plaintiff Kensinger opposes subpart (iv) the
 2 exclusion of argument or evidence pertaining to the customs, policies, and or practices of the
 3 CHP on the basis that these items are relevant and necessary for the determination of factual
 4 issues to be presented before the jury per Federal Rules of Evidence Rule 402.

5 6 II. ANALYSIS

7 A. Defendant Officer Craft's Credibility Is At Issue in This Case. Whether or Not 8 Defendant Craft Conformed His Actions to CHP Customs, Policies, and Practices 9 When He Failed to Document the Application of Any Force Against Plaintiff 10 Kensinger During the Arrest is Relevant to the Issues of His Credibility.

11 "All relevant evidence is admissible, except as otherwise provided by the Constitution of
 12 the United States, by Act of Congress, by these rules, or by other rules prescribed by the
 13 Supreme court pursuant to statutory authority. Evidence which is not relevant is not
 14 admissible." Fed. R. Evid. 402 (WEST 2012). Relevant evidence consists of "evidence having
 15 any tendency to make the existence of any fact that is of consequence to the determination of the
 16 action more probable or less probable than it would be without the evidence." *Millenkamp v.*
 17 *Davisco Foods Intern., Inc.*, 562 F.3d 971, 980 (9th Cir. 2009). Conversely, "[e]vidence is
 18 considered irrelevant if it fails to make any fact of consequence more or less probable."
 19 *McKinney v. Rees*, 993 F.2d 1378, 1380 (9th Cir. 1993).


20 The jury is tasked to decide whether or not Defendant Craft acted in good faith and
 21 without malice in the application of force during the arrest of Plaintiff Sean Kensinger. Plaintiff
 22 contends and intends to prove that Defendant Craft's actions subsequent to the arrest deviated
 23 from CHP customs, procedures, and practices when he failed to document the application of any
 24 force against Plaintiff Kensinger in the accompanying arrest report. Plaintiff Kensinger will
 25 argue that the failure to document any force used by Defendant Craft was a calculated decision
 26 to hide the excessive force that resulted, which violated Plaintiff Kensinger's 4th Amendment
 27 rights. The credibility of Defendant Craft is at issue in this case. In assessing Defendant Craft's
 28 credibility, the jury must be presented with the applicable customs, practices, and policies of the
 CHP upon which to judge Defendant Craft's actions and credibility.

III. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court deny Defendant Craft's Motion in Limine No. 2 in part to exclude evidence or argument pertaining to the customs, practices, and policies of the CHP.

DATED: June 6, 2012

HIGA & GIPSON, LLP

By 
RONNIE R. GIPSON JR.
Attorneys for Plaintiff
SEAN KENSINGER